

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

FRISCO SAN JUAN AYALA,

Defendant.

NO: 2:12-CR-49-RMP-5

ORDER DENYING DEFENDANT'S
MOTION TO REDUCE SENTENCE

BEFORE THE COURT is Defendant's Motion for Reconsideration of his sentence, **ECF No. 577**. The Ninth Circuit Court of Appeals remanded this case for consideration under 18 U.S.C. § 3582(c)(2) in light of the June 2016 decision in *United States v. Davis*, 825 F.3d 1014, 1027 (9th Cir. 2016) (en banc). Having reviewed the parties' briefing and the relevant record, the Court is fully informed.

On March 29, 2013, Defendant Ayala entered into a plea agreement with the Government pursuant to Fed. R. Crim. P. 11(c)(1)(C). Defendant pleaded guilty to one count of possession of 360 grams of heroin with intent to distribute. ECF No. 376 at 6. The count to which Defendant pleaded guilty concerned one hundred grams or more of heroin, or a mixture containing it, while Defendant was

1 originally indicted for conspiracy to distribute one kilogram or more of the
2 substance.

3 The parties agreed that a 96-month term of incarceration was the appropriate
4 disposition of the case. The parties further agreed that Defendant's total offense
5 level would be 23. With respect to the sentencing range, the parties agreed that
6 "the United States Sentencing Guidelines (hereinafter "U.S.S.G.") are applicable to
7 this case and that the Court will determine the Defendant's applicable sentencing
8 guideline range at the time of sentencing." ECF No. 376 at 6.

9 The Court determined that Defendant's total offense level was 25; his
10 criminal history category was IV; and, thus, the applicable U.S.S.G. guideline
11 range was 84 to 108 months. ECF No. 425. After reviewing the plea agreement
12 and considering the factors in 18 U.S.C. § 3553(a), the Court sentenced Defendant
13 to 96 months of imprisonment and a 6-year term of supervised release. ECF No.
14 424.

15 In 2014, the United States Sentencing Commission amended the U.S.S.G. to
16 reduce the recommended penalties for most drug trafficking offenses by lowering,
17 by two levels, the offense levels in the §2D1.1 Drug Quantity Table ("Amendment
18 782"). The Sentencing Commission established that the Amendment 782
19 reduction could be applied retroactively pursuant to 18 U.S.C. § 3582(c)(2), which
20 authorizes a district court to reduce an otherwise final sentence in light of
21 subsequent amendments to the U.S.S.G.

1 To be eligible for relief under § 3582(c)(2), the original sentence must have
2 been “based on” the U.S.S.G. In *Freeman v. United States*, 564 U.S. 522 (2011),
3 the Supreme Court considered whether “defendants who enter into [Rule
4 11(c)(1)(C)] plea agreements that recommend a particular sentence as a condition
5 of the guilty plea” may secure reductions to their sentence through § 3582(c)(2),
6 *i.e.* whether 11(c)(1)(C) defendants’ sentences are *ever* “based on” the U.S.S.G.
7 *Freeman* did not produce a majority opinion and instead resulted in four justices
8 joining a plurality opinion, Justice Sotomayor authoring a concurring opinion, and
9 four justices joining a dissent.

10 The Ninth Circuit initially interpreted the result in *Freeman* to hold that
11 sentences imposed pursuant to Rule 11 plea agreements were not “based on” the
12 U.S.S.G., with minor exceptions, and, therefore, could not be modified under §
13 3582(c)(2). See *United States v. Austin*, 676 F.3d 924, 930 (9th Cir. 2012).
14 However, in June 2016, the Ninth Circuit overruled *Austin* and held that a
15 defendant whose original sentence followed a Rule 11 plea agreement “should be
16 eligible for a sentence reduction when one factor in a defendant’s sentence was a
17 ‘since-rejected Guideline.’” *United States v. Davis*, 825 F.3d at 1027 (*quoting*
18 *Freeman*, 564 U.S. at 530).

19 A court must perform a “two-step inquiry” in determining whether to reduce
20 a defendant’s sentence under § 3582(c)(2). *Dillon v. United States*, 560 U.S. 817,
21 826 (2010). The first determination is whether any U.S.S.G. amendments apply to

1 defendant's sentence. *Dillon*, 560 U.S. at 826-27. Second, if the court determines
2 that a defendant is eligible for relief, the court must weigh the sentencing factors
3 set out in 18 U.S.C. § 3553(a), to the extent that they are applicable, and determine
4 whether a reduction within the amended U.S.S.G. range is warranted. *Dillon*, 560
5 U.S. at 826-27.

6 The factors for a sentencing judge to consider under 18 U.S.C. § 3553(a)
7 include, as applicable: "the nature and circumstances of the offense and the history
8 and characteristics of the defendant; the need for the sentence imposed; the kinds
9 of sentences available; the kinds of sentence and the sentencing range established
10 in the Guidelines; any pertinent policy statement issued by the Sentencing
11 Commission; the need to avoid unwarranted sentence disparities among defendants
12 with similar records who have been found guilty of similar conduct; and the need
13 to provide restitution to any victims." *United States v. Carty*, 520 F.3d 984, 991
14 (9th Cir. 2008); 18 U.S.C. § 3553(a)(1)-(7).

15 The Court's application of the first step of the inquiry differs from the
16 Court's order denying Defendant's first motion for a reduction in sentence based
17 on Amendment 782, because the Ninth Circuit had not yet decided *Davis*, 825 F.3d
18 1014. *See* ECF No. 532. Defendant's plea agreement required the Court to
19 determine the applicable guideline range at the time of sentencing and
20 contemplated a 3-level downward adjustment for acceptance of responsibility.
21

1 At sentencing, the Court determined Defendant's base offense level,
2 independent of the parties' agreement, adjusted Defendant's offense level
3 downward by three levels, and entered a 96-month sentence, which fell within the
4 calculated range. All four of these circumstances closely align with the
5 circumstances that the circuit court viewed as leaving "no doubt" that the *Davis*
6 defendant's sentence was "based on" the U.S.S.G. *See* 825 F.3d at 1027-28.

7 However, the Court concludes that *Davis* does not change the outcome of
8 the two-step inquiry as a whole. The second factor requires a discretionary
9 determination as to whether Defendant's sentence warrants a reduction under §
10 3582(c)(2) and related policy statements in U.S.S.G. 1B1.10. Following
11 Amendment 782, and holding all other calculations constant, Defendant's amended
12 offense level is 23 with an amended U.S.S.G. range of 70 to 87 months.

13 Considering whether a reduction is warranted in light of the §3553(a)
14 factors, the Court concludes that a term of 96 months is still appropriate. There are
15 several indications that Defendant Ayala realized significant benefits of the bargain
16 he made with the Government. Defendant pleaded guilty to a superseding
17 indictment alleging possession of a much lower quantity of heroin than originally
18 charged. While the plea agreement stated a "Final Offense Level" of 23, which
19 would have meant a Guidelines range of 70 to 87 months at criminal history
20 category IV, the parties agreed to a period of incarceration above that range. The
21 Government avers that Defendant "faced a mandatory 120-month sentence if a

1 sentencing enhancement (based on his prior drug-related convictions] had been
2 filed.” ECF No. 578 at 11.

3 The Court further notes that the final presentence investigation report, with
4 amendments as ordered by the Court at sentencing, set out Defendant’s “significant
5 prior history of assaultive conduct,” the seriousness of which may have been
6 inadequately reflected by Defendant’s criminal history category. ECF No. 422 at
7 33. Indeed, Defendant was carrying brass knuckles at the time of his arrest leading
8 to his instant conviction. In determining Defendant’s sentence, the Court also was
9 cognizant of the need to avoid unwarranted sentence disparities between similar
10 codefendants.

11 Accordingly, **IT IS HEREBY ORDERED** that Defendant Ayala’s Motion
12 for Sentence Reduction, **ECF No. 577**, is **DENIED**. Defendant Ayala’s sentence
13 of incarceration shall **REMAIN at 96 months**.

14 **IT IS SO ORDERED.**

15 The District Court Clerk is directed to enter this Order and provide copies to
16 counsel.

17 **DATED** March 2, 2017.

18
19 *s/ Rosanna Malouf Peterson*
20 **ROSANNA MALOUF PETERSON**
21 **United States District Judge**